



Tushnet: Comment on Cox

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Mark V. Tushnet

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COMMENT

MARK V. TUSHNET*

Bradley Canon, a political scientist, has identified more than ten meanings of the terms "judicial activism" and "judicial restraint."¹ Under the circumstances it is hardly surprising that I have little original to add to the discussion. Indeed, my lack of originality is so great that this Comment is primarily an elaboration of some points touched on in passing in Professor Cox's more wide-ranging article. Nonetheless, it may help to restate them in my own way.

My basic theme is that the concepts of activism and restraint are, in themselves, quite unhelpful because they refer to too many things. I will identify five different meanings of activism and show that they are independent of each other. Thus, when someone describes a decision or a judge as activist, we have to know which meaning is intended. Yet, once we identify the precise meaning at issue, we can discuss the merits of the underlying claim without using the terms activism or restraint. As we will see, however, there is a sixth meaning of the concepts which is not entirely independent of the prior ones. Even that final meaning, though, does not make the concepts very interesting.

The first meaning of judicial activism is technical. The Supreme Court is supposed to decide only real cases; it is not supposed to give advice to people who simply would like to know whether some law is constitutional or not. According to this definition of activism, the Court should therefore decide cases only when its decision will actually affect people's legal rights. Consider, then, some examples. The Price-Anderson Act² is a federal law about insurance for disasters at nuclear power plants. Under the Price-Anderson Act, if a disaster occurs at a nuclear power plant, the entire industry helps pay for the damages, but only up to a specified and, according to most analysts, still rather low limit, despite recent amendments. Opponents of nuclear power brought a suit claiming that the Price-Anderson Act was unconstitutional because if a nuclear disaster occurred and damages exceeded the statutory limit,

* Professor of Law, Georgetown University Law Center. A.B., Harvard College, 1967; M.A., Yale University, 1971; J.D., Yale Law School, 1971.

1. See Canon, *A Framework for the Analysis of Judicial Activism*, in *SUPREME COURT ACTIVISM AND RESTRAINT* (S. Halpern & C. Lamb ed. 1982).

2. 42 U.S.C. § 2210 (1982 & Supp. III 1985).

people who lived near the plant would bear uncompensated losses while the rest of us got the benefit of nuclear power.³ This might seem to be a request for an advisory opinion because the Price-Anderson limit has never been exceeded in any nuclear disaster. The Court reached the merits of the constitutional challenge anyway.⁴ It found that there was a real and present controversy between people who lived near the site of a proposed nuclear plant and the power company. The residents would be injured not by a nuclear disaster, which might never occur, but by the fact that the plant would discharge heated water into a nearby lake, thus making the lake less suitable for recreation. And Price-Anderson would cause this injury because the power company would not build the plant unless it were sure that its liability for future disasters would be limited. It seems fair to describe the Court's decision to reach the merits of the constitutional challenge as activist according to the first meaning of activism.

Another example of activism in this sense comes from the area of criminal law. Many state constitutions have provisions quite similar to those in the federal constitution. Sometimes a defendant claims that evidence found in a search should be excluded from trial because the search was unconstitutional. If the search is found unconstitutional under state law, the Supreme Court cannot do anything about the decision to exclude the evidence because it has the power to review only decisions based on federal law. What if the state court says that it is excluding the evidence because the search violated both the state and the federal constitutions? A Supreme Court decision saying that the state court was wrong about the federal constitution would be an advisory opinion, because the state court would still exclude the evidence based on its interpretation of state law. Sometimes, though, state courts do not make it clear that they are relying on their state constitutions, especially when the language of the two constitutions is similar. A court interested in judicial restraint would resolve these ambiguities by refusing to hear the cases, thus avoiding the risk of rendering an advisory opinion. In 1983 the Supreme Court moved in the other, activist direction, adopting the rule that it would assume that ambiguous decisions relied on the federal constitution.⁵

Here we should note two things. The Price-Anderson opinion was written by Chief Justice Burger, and the state constitution deci-

3. See *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978).

4. *Id.* at 82.

5. See *Michigan v. Long*, 463 U.S. 1032 (1983).

sion was written by Justice O'Connor. This first type of activism, then, is not the same as "liberalism," as we usually think of it. Second, I have not yet described the Court's decisions on the merits in these cases, and when I do you will see why there are other meanings of activism. The Court upheld the Price-Anderson Act;⁶ it also held that the criminal evidence at issue should not have been excluded.⁷ In both cases the Court did not overturn the decisions of democratically elected or responsible decisionmakers.

The second meaning of activism is also somewhat technical, although it begins to move in a more substantive direction. Professor Cox alludes to it in his discussion of the propriety of and limits upon overruling prior Supreme Court decisions. According to the second meaning of activism, a court is activist if it readily overturns precedents, at least without severe problems having arisen in the administration of the rule derived from the precedent. At the end of its most recent term, the Court demonstrated its activism in this sense by overruling three cases, two decided in the 1960s and one handed down in 1860.⁸ Yet the present Court cannot be regarded as completely activist in this sense; on at least two recent occasions, the Court adhered to precedents that at least some of its members regarded as not very well reasoned.⁹ Once again, we should consider the proposition that activism in this second sense is not the same thing as "conservatism," as Professor Cox has stressed. Were the Court to overrule *Roe v. Wade*,¹⁰ for example, it would be activist in this sense and conservative in political terms.

The third meaning of judicial activism is linked to the idea of democracy. An activist decision substitutes the judgment of unelected judges for those of elected decisionmakers. Again, consider some examples. A city school board, an elected body, negotiated a contract with a teachers' union, itself an internally democratic body. Among other provisions, the contract dealt with layoffs in the face of fiscal stringency or declining enrollments. The layoff provi-

6. *Duke Power*, 438 U.S. at 85.

7. *Long*, 463 U.S. at 1051.

8. See *Welch v. Texas Dep't of Highways*, 107 S. Ct. 2941 (1987) (overruling *Parden v. Terminal Ry.*, 377 U.S. 184 (1964)); *Solorio v. United States*, 107 S. Ct. 2924 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258 (1969)); *Puerto Rico v. Branstad*, 107 S. Ct. 2802 (1987) (overruling *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860)).

9. See *Vasquez v. Hillery*, 474 U.S. 254 (1985) (reversing conviction of defendant indicted by grand jury selected in racially discriminating manner); *Miller v. Fenton*, 474 U.S. 104 (1985) (holding that federal court in habeas corpus proceeding may independently determine voluntariness of confession).

10. 410 U.S. 113 (1973).

sion had an affirmative action element, according to which the usual principle of seniority—"first hired, last fired"—was tempered by an effort to maintain the positions of more recently hired minority teachers. It should be noted, too, that whites were a majority in the city and in the teachers' union. Disgruntled white teachers, who had been unable to persuade or muster enough political clout to influence either the school board or their union, turned to the federal courts.¹¹ The Supreme Court's decision invalidating the contract freely negotiated between two democratically responsible bodies is activist in this third sense.

Another example of judicial activism is provided by a more recent case. California's voters have created a Coastal Commission whose goal is to protect the coastline. One way it does so is by requiring that people with homes on the coast obtain permits for any home alterations. The Commission can impose conditions on the permits—for example, it can specify that a home addition be built according to certain methods that minimize the risk of beach erosion. In a case recently decided by the Supreme Court, homeowners wanted to replace their beach bungalow with a larger house.¹² The Commission required the homeowners, as a condition of obtaining the required building permit, to provide public access to the beach in front of their house. The homeowners claimed that the Commission was "taking" their property—the right to exclusive use of the beach—without compensating them as required by the Constitution. The Court's decision in favor of the homeowners¹³ was activist in the third sense, overturning a decision by a democratically responsible body.

Once again we see that there is no necessary connection between conservatism and restraint in this third sense. Perhaps more important, though, is that calling a decision activist because it overturns a decision made by a democratic body is simply saying that the decision is an application of the Constitution, at least so long as we think that judicial review is part of the Constitution. After all, we would not have judicial review if we thought that majority decisionmakers would always comply with the Constitution.¹⁴ We can

11. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

12. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987).

13. *Id.* at 3150.

14. This observation undermines the force of Professor Morgan's effort to characterize judicial review as the enforcement of a bargain we made with ourselves. After all, "we"—that is, those of us living today—did not enter into the bargain in any explicit way; the bargain was made in 1787 and 1868 among people not all of whom are in a useful sense predecessors in interest to many of us today. Therefore, binding us today

move to the fourth meaning of activism to see how activism is connected to the idea of constitutionalism. Proponents of judicial restraint might defend the affirmative action and beachhome decisions by saying that the Court *can* overturn decisions made by democratically responsible bodies, but only when the democratic body has contravened the clear intent of the drafters of the Constitution. The fourth meaning of judicial activism, then, is that an activist decision invalidates a statute on some ground other than that it violates the intent of the framers.

On this occasion I do not want to enter into the debate about the jurisprudence of "original intention." Rather, I again want to illustrate the fourth meaning of judicial activism, here by using examples of judges or decisions that are *restrained* according to this meaning. A generation ago Justice Hugo Black was the leading proponent of judicial restraint in this sense. Black contended that the framers of the fourteenth amendment intended that the states would thereafter have to comply with the requirements of the Bill of Rights, and cited speeches in the House and Senate by the amendment's primary sponsors saying exactly that.¹⁵ He argued that the establishment clause of the first amendment rather severely limited the permissible official interactions between church and state, relying on arguments developed by James Madison, the primary author of the establishment clause, in the course of his ten-year effort to have Virginia adopt its Statute on Religious Liberty.¹⁶ More recent conservative critics of Black have shown that it is necessary to qualify Black's historical arguments around the edges, but his fundamental points remain unimpaired.

Justice Black was a straightforward liberal originalist. More subtle is the originalism of Louis Brandeis, who relied on his interpretation of the framers' basic theory of the relation between government and citizen to state his—and to Brandeis, the framers'—understanding of free speech in an eloquent opinion in 1927.¹⁷ Note the opening words of each sentence in the opinion's core passage: "*Those who won our independence* believed *They* valued liberty *They* believed liberty *They* believed that freedom *They* recognized the risks But *they* knew [and finally] Believing in the power of reason as applied through public discussion, *they* eschewed

to the bargain that they struck then requires some justification independent of the rationale that bargains should be enforced.

15. See *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting).

16. See *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

17. See *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

silence coerced by law—the argument of force in its worst form.”¹⁸ By examining the framers’ general theories of government, Justice Brandeis, like later originalists, could use a theory of judicial restraint in the fourth sense to limit decisions made by democratic processes, thus promoting judicial activism in the third sense.

It is a matter of some controversy among scholars of constitutional law how far one can go with this sort of originalism. Some have defended the Court’s death penalty decisions by invoking their reconstruction of the framers’ theory of government.¹⁹ Others are troubled by such arguments but have difficulty explaining why something like wiretapping, which the framers could not have contemplated, ought to be regulated by the Constitution. Every argument that brings wiretapping in opens the way to the much broader arguments I have mentioned. The fourth meaning of judicial activism (and restraint), which limits the concepts to the jurisprudence of original intention, is therefore less useful than the preceding three meanings, because it does not really point to any identifiable phenomenon in the behavior of courts.²⁰

The fifth meaning of activism derives from the citizen’s perspective on the government.²¹ From the citizen’s point of view what matters most is how his or her life is constrained by government.²² The organ or branch of government imposing such constraints is much less important to the citizen than the scope of the constraints. According to the fifth meaning of activism, we should look at the activity of the government as a whole: an activist court is an arm of an activist government. For example, the Court in the 1940s was an activist court with respect to economic matters, because it endorsed the actions of the New Deal in imposing governmental constraints on private economic activity. A more recent example of judicial activism in this sense of supporting an activist government is the Supreme Court’s decision in *Bowers v. Hardwick*²³ upholding state

18. *Id.* (emphasis added).

19. See, e.g., Richards, Book Review, 71 CAL. L. REV. 1372 (1983).

20. It might be useful in those occasional cases when judges fail even to invoke originalist arguments. The standards of the practice of writing opinions, however, almost invariably lead judges to include such invocations. See Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244 (1987).

21. This meaning is also related to some arguments by political scientists about the place of courts in a government. See M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981).

22. See Seidman, *ABSCAM and the Constitution*, 83 MICH. L. REV. 1199, 1204-07 (1985).

23. 106 S. Ct. 2841 (1986). One might somewhat more controversially characterize the Court’s general position on criminal procedure as activist in this sense. Certainly,

laws against private consensual sodomy. Conversely, an example of judicial restraint in this fifth sense, that is, of judicial limitations placed on governmental regulation of private life, would of course be the abortion cases in the Supreme Court.²⁴

Once again this collection of examples shows that activism is not necessarily related to conventional "conservative" or "liberal" labels. In this fifth sense the sodomy decision was activist and conservative, the New Deal cases were activist and liberal, and the abortion decisions were restrained and liberal. Similarly, I have argued that *none* of the meanings of activism or restraint has any systematic relation to conventional political labels or indeed to anything else. What then is the function of these concepts?

Here I turn to the sixth and final meaning of activism and restraint. They are what philosophers have called "praise words" and "blame words." Given an extended discussion of the courts in which the sentence "This was an activist decision" appears, we can translate the sentence, knowing its context, as "I approve (or disapprove) of the decision." Similarly, if the sentence is "I disapprove of this decision because it exemplifies judicial activism," we know nothing more after hearing the second half of the sentence than we did after hearing the first half.

We offer praise and blame according to some underlying theories, of course, and we might choose to capture those theories with a single word or phrase like activism or restraint. Yet when that same word or phrase is used to summarize different underlying theories—for example, majoritarianism (the third meaning I discussed) and originalism (the fourth meaning)—the likely result is confusion. For almost a generation legal scholars of constitutional law have argued that it was unhelpful to talk about the courts using the terms activism and restraint. The ambiguity of the implied reference to underlying theories explains why.

This might suggest the conclusion that the terms ought to be abandoned. There is, however, one final observation that seems worth making. I have called activism and restraint praise and blame words. If we look at the actual rhetoric of discussions of the Supreme Court, we see that they are not equally so. Sometimes people mean to praise a decision by calling it activist, but usually activ-

the Court's overall enthusiasm for intrusive methods of crime detection and investigation seems activist, yet it seems hard to defend a posture of governmental restraint *per se* in the detection and investigation of crime.

24. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Thornburgh v. American College of Obstetricians*, 106 S. Ct. 2169 (1986).

ism is a blame word, and conversely with restraint. I suspect that activism tends to be a blame word for relatively deep cultural reasons, primarily because of the fourth—"activist state"—meaning of activism. Everyone knows that, looked at over the long run, our government has become increasingly activist, and almost everyone is a little uneasy about that development. Activism as a blame word captures that unease. (Consider how it would sound if we started talking about "judicial energy" and "judicial lassitude.") Yet we also know that there is very little we can do to halt the rise of activist government, so we cannot let activism become a blame word altogether. The ambiguities of the idea of judicial activism let people express their unease about activist government. In the first instance, it directs the criticism at the courts, an institution that is quite unimportant in the overall development of the activist state.²⁵ And in the last instance, it allows people to say that they are uneasy about activist government without doing much about it. In the end, I suspect, the concept of judicial activism is the last, relatively trivial bastion of conservative opposition to the modern state.

25. For example, the courts have had essentially nothing to say about national security policy, the size of the budget—even (for the most part) its allocation between domestic and military expenditures—tax policy, and the like.